IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 90

JAMES ZARICHNY,
Petitioner,
vs.
STATE BOARD OF AGRICULTURE and SARAH VAN HOOSEN JONES, WINIFRED G. ARMSTRONG, FOREST H. AKERS, FREDERICK H. MUELLER, CLARK L. BRODY, ELLSWORTH B. MORE, MEMBERS OF THE STATE BOARD OF AGRICULTURE,
Respondents

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI

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No. 828

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STATEMENT

Respondents in opposing petition for writ of certiorari herein contend that (a) the record in the Michigan Supreme Court fails to show that a substantial federal question was presented and decided, (b) that the decision of

the Michigan Supreme Court "may very well" have been based on nonfederal questions of substantive law and procedure and (c) that even conceding that federal questions were presented to and decided by the Michigan Supreme Court, its decision was correct on the merits.

Petitioner contends that substantial federal questions were presented to and decided by the Michigan Supreme Court and that its decision in denying petitioner's application to obtain reinstatement in Michigan State College by writ of mandamus contravenes rights under the freedom of speech and assembly guaranties of the First Amendment to the United States Constitution, the due process clause of the Fifth Amendment, and the due process, privilege and immunities and equal protection of the law provision of the Fourteenth Amendment.

ARGUMENT

The Substantial Federal Questions

Petitioner was summarily expelled from Michigan State College on the eve of graduation without a hearing (R. 6). His written request for an explanation went unanswered (R. 7).

The Michigan Supreme Court denied petitioner's application for writ of mandamus without opinion (R. 7) and thereafter denied his motion for rehearing without opinion (R. 17). Petitioner was not granted a hearing either with respect to his application for the writ of mandamus or his motion for rehearing (R. 8, R. 17).

Respondents suggest that the writ of mandamus is one of grace rather than one of right and that as the Michigan Supreme Court could have denied petitioner's application for the writ as a matter of discretion, this Court should not disturb the State Court's decision (Respondents' brief, 5).

The fact is, however, that in cases where the duty sought to be enforced is absolute, mandamus is no more a matter of discretion than any other remedy, and that the writ, though a prerogative one, is demandable as of right in a proper case. *Auditor General v. Treasurer,* 73 Mich. 28; *Hamilton v. Secretary of State,* 212 Mich. 31; *Leininger v. Secretary of State,* 316 Mich. 644; cf. *People ex rel. Drake v. Regents,* 4 Mich. 98.

This Court has held that a judgment denying an application for writ of mandamus is final and reviewable. *Hartman v. Greenhow,* 102 U. S. 672.

Petitioner expressly charged in his application for writ of mandamus that he was expelled from the college in violation of his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution (R. 3).

In *Young v. Ragen*, — U. S. —, 69 S. Ct. 1073, where petitions for *habeas corpus* were denied by state courts without a hearing, this Court stated (at p. 1074):

> "• • • it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right."

cf. *Townsend v. Burke*, 334 U. S. 736; *Lovell v. City of Griffin*, 303 U. S. 444; *Broad River Power Co. v. State of South Carolina*, 281 U. S. 537.

See also *Williams v. Kaiser*, 323 U. S. 474, where petition for writ of *habeas corpus* was denied by the state court without a hearing on the ground that it failed to state a cause of action. This Court stated (at p. 479):

> "The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right."

Alleged Nonjoinder of Parties Defendant in State Court Proceeding

For the first time respondents raise in this Court a contention that "it is entirely possible" the Michigan Supreme Court denied petitioner's application for mandamus for the "simple" reason that the proper parties were not before the court. It is suggested that the college president and the dean of students should have been made parties defendants, though it is admitted that government of the

college is vested in the State Board of Agriculture by the Michigan Constitution (Respondents' Brief, 6).

Although Respondents filed a detailed answer to the application for mandamus and a motion to dismiss the same, the contention of nonjoinder was not mentioned (R. 5-15).

The answer to this contention is comparatively simple. In Michigan it is provided by statute that no action at law or in equity shall be defeated by reason of the nonjoinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped as the ends of justice may require. Comp. Laws Mich. 1929, Sec. 12364; M. S. A. 27.665. Moreover, the Michigan Supreme Court may at any time allow new parties to be added or parties to be dropped. Michigan Court Rules, Rule 72, Section 1 (b). Ordinarily if the proper parties plaintiff are not joined, the Supreme Court will direct their joinder on appeal. *Henkel v. Henkel,* 282 Mich. 473. No reason can be seen why this rule would not be applied equally well where there has been a nonjoinder of defendants.

Furthermore, it has been held that the plea of nonjoinder of parties defendant must be raised, if at all, by a plea in abatement. *Dillenbeck v. Simons,* 105 Mich. 373. Admittedly, respondents raised no such plea in the State Court.

In any event, the president of the college (by statute the administrative head: C. L. 1929, Sec. 7867; M. S. A. 15.1133) is *ex-officio* a member of the State Board of Agriculture (Art. XI, Sec. 8, Michigan Constitution) and was therefore effectively before the State Court.

On What Grounds Was Petitioner Expelled Without a Hearing?

Respondents contend that petitioner was expelled (*i. e.* refused readmittance) for violation of strict probation by reason of repeated infractions of school discipline over a great period of time (Respondents' Brief, 7, 8). The act charged as a violation of probation was petitioner's attendance at a public civil rights off campus meeting (Ibid. 8).

Respondents suggest that petitioner's "academic record deteriorated steadily" during the months immediately preceding his being denied readmittance and was an additional justification for the action taken against petitioner by the college authorities (Ibid. 8).

In the letter notifying petitioner that he had been placed on strict probation the following statement appears (R. 5, 6):

> "I am sure that you understand that this action is based solely upon your continued participation in the AYD after it had been refused recognition by the Student Council. Any political beliefs that you may hold play no part in this action, and the Faculty Committee and the College have not been concerned with your membership in any particular party or your allegiance to any particular political group."

Petitioner was not put on probation for any scholastic deficiency and there can be no claim that his scholastic record had anything to do with his expulsion. At the time petitioner was refused readmittance he had completed 183 term credits out of a total of 200 term credits required for graduation (official transcript issued by the Office of the Registrar August 2, 1949) and would have been able to complete the remaining 17 credits and been graduated in another quarter term (Michigan State College Catalog,

1946-1948, Announcements for 1948-1949, pp. 53, 54). The transcript shows above average grades.[1]

Respondents' contention that probation and expulsion were justified on a scholastic basis is of the *post hoc, ergo propter hoc* variety. It may be argued with much greater force that petitioner's grades were the result of the unjust and arbitrary action of the college authorities in keeping petitioner under an unwarranted probation subject to "automatic" suspension in the event of violation (R. 5).

Respondents' contentions as to the grounds for petitioner's expulsion from the college do not stand up under analysis. According to the letter placing petitioner on probation, the sole reason therefor was petitioner's continued participation in the AYD (American Youth for Democracy) after it had been refused recognition by the Student Council (R. 5, 6). The letter notifying petitioner that he had violated his probation and would not be permitted to re-enroll as a student at the college merely stated that petitioner had been permitted to return to college for the Fall 1947 Term on "strict disciplinary probation" and that

> "It has been determined that you have violated the terms of this agreement (sic) and you are hereby notified that because of this violation you will not be permitted to re-enroll as a student at the Michigan State College" (R. 6).

Petitioner was given no inkling as to what he had done or upon what basis it had been determined that he had violated probation. The letter does not disclose how or by whom the determination of violation had been made and

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[1] The transcript shows 60 credit hours of A work, 52 credit hours of B work, 59½ credit hours of C work, 29½ hours of D work (condition). Petitioner failed in seven courses for a total of 24½ hours.

petitioner was given no opportunity for a hearing. His request for particulars went unanswered (R. 7). The threat of "automatic suspension" without specification of charges or an opportunity to be heard was thus carried out.

The material facts are not substantially in dispute. Petitioner and five other students were placed on probation on a charge that they continued activities of the college chapter of American Youth for Democracy after it had been denied recognition by the Student Council (R. 12). AYD was one of three groups seeking recognition on the basis of interest in housing problems, the problems of veterans, racial equality, etc. (R. 11). It was charged in the student newspaper that members of AYD had continued to meet as an organization, and had circulated handbills at an authorized on-campus student rally advocating an FEPC for Michigan (R. 12). Respondents charged that petitioner acknowledged he had been distributing Communist Party literature and soliciting funds from students for subscription thereto (R. 13). Petitioner denied this allegation (R. 15).

In the ensuing months all of the students so placed on probation except petitioner were taken off probation and restored to normal academic status (R. 12).

On December 6, 1948 petitioner attended a meeting off-campus at which one of the 12 Communist leaders indicted by the Federal Court in New York spoke (R. 13). Respondents assert that petitioner arranged for the meeting, planned and conducted the program and made an appeal to the audience for cash contributions to aid in the defense of the 12 (R. 13, 14). Petitioner denied these allegations except that he assisted in arranging for a place for the meeting and that he attended the meeting as a spectator (R. 15). He denied making any appeal for funds and

stated that he rose to protest against such an appeal on the ground that it would only produce trouble (R. 16). Petitioner further pointed out that the meeting in question was not sponsored by any student organization but by the Ingham County Civil Rights Committee; that it was held off the campus; that his right to attend and even to arrange for and plan the meeting was not subject to regulation and control by the college authorities as it related solely to petitioner's private and personal life and that his expulsion therefor constituted an invasion and deprivation of his constitutional rights as set forth in his petition for mandamus (R. 16).

The meeting referred to was held on December 6, 1948. Four days later petitioner was notified in writing that he had violated his probation and would not be permitted to re-enroll as a student (R. 6).

Respondents also charge that in the spring of 1948 petitioner was held in contempt of the Michigan State Senate for his refusal to state whether or not he was a member of the Communist Party, but that in spite of "unfavorable publicity and public clamor" petitioner was permitted to continue as a student at the college as he was not considered to have violated his probation terms by reason of the matter referred to (R. 13).

In his petition for writ of mandamus, petitioner alleged that Michigan State College President Hannah orally informed him that he was expelled because he had broken his agreement to keep "out of the limelight" (R. 2). Respondents in their answer admit this allegation adding that "petitioner was advised that his violation of the terms of his disciplinary probation was the primary reason for refusing to re-admit him as a student" (R. 10).

The foregoing facts do not support President Hannah's disclaimer that petitioner's probation had any political significance (R. 5, 6). Rather they reveal an arbitrary and unreasonable suppression of petitioner's right as an adult citizen to exercise and enjoy his constitutional privileges of free speech and assembly. That this was done under the guise of maintaining discipline in no way alters the fact that petitioner was deprived of his right to receive an education in a state- and federally-supported college on unspecified charges and without a hearing. It is submitted that the right of the governing authorities of a state university to make reasonable rules and regulations for the orderly management of the school and the preservation of discipline must yield to and cannot supersede the overriding right of adult students to enjoy their constitutionally guaranteed rights of free speech and assembly.

It is stated in Respondents' brief (p. 9) that the privilege of attending Michigan State College is not derived from federal sources but is accorded by the State of Michigan. The fact remains, however, that Michigan State College is supported by both state and federal funds (*e. g.*, Public Acts of Michigan, Act 1, 1946 (Ex. Sess.), M. S. A. 15.954 (1)-15.954 (5); U. S. C. A., Title 7, Sections 343c, 343d, 427-427g) and individuals qualified to receive an education there who comply with all reasonable rules, regulations and requirements may not arbitrarily be refused the right to enter and be graduated.

The Michigan Supreme Court Orders Denying Relief Deprives Petitioner of His Constitutional Rights Under the First, Fifth and Fourteenth Amendments

No case can be found to support a contention that the power of governing authorities of educational institutions to expel students is absolute. The rule is clear that no student may be arbitrarily expelled. *55 Am. Jur.* 15; *Baltimore University v. Colton,* 98 Md. 623; *Booker v. Grand Rapids Medical College,* 156 Mich. 95; *50 A. L. R.* 1502. The discretion vested in school authorities to expel students is very broad, but they will not be permitted to act arbitrarily. Whether they have done so under stated circumstances is a question of law for the courts. *Tanton v. McKenny,* 226 Mich. 245.

In *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, this Court answered a contention that the functions of educational officers in states, counties and school districts should not be interfered with (specifically with respect to a compulsory flag salute by school children) as follows (pp. 637, 638):

> "The Fourteenth Amendment as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. *That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.*" (Emphasis added.)

The foregoing stands in strong contrast to the following language in *Tanton v. McKenny, supra,* 226 Mich. 245:

> "It will be remembered also that respect for constituted authority and obedience thereto is an essential lesson to qualify one for the duties of citizenship, and that the schoolroom is an appropriate place to teach that lesson * * *."

Respondents contend that by entering college, petitioner submitted himself to "broad disciplinary powers" of the Michigan State College authorities (Respondents' Brief, 9). Admittedly such disciplinary powers are broad, but not so broad as to exclude judicial review when exercised arbitrarily, unreasonably and unconstitutionally.

CONCLUSION

Respondents fear that if relief is granted petitioner in this case, discipline in all state institutions of higher learning as well as secondary and primary schools would be subverted. It is submitted, however, that if discipline is maintained by arbitrary and unconstitutional measures, it is time to overhaul our educational system so that it may be brought within the ambit of constitutional requirements and to the observance of the Bill of Rights.

For the reasons stated, it is earnestly contended that the writ of certiorari prayed for should be granted.

Respectfully submitted,

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